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असाधारण

EXTRAORDINARY

भाग II—खण्ड 3—उप-खण्ड (iii)

PART II—Section 3—Sub-section (iii)

प्राधिकार से प्रकाशित

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भारत निर्वाचन आयोग

अधिसूचना

नई दिल्ली, 7 अप्रैल, 2010

आ.अ. 13(अ).—लोक प्रतिनिधित्व अधिनियम, 1951 (1951 का 43) की धारा 106(ख) के अनुसरण में निर्वाचन आयोग, 2009 की निर्वाचन याचिका सं. 44 में भारत के उच्च न्यायालय, मध्य प्रदेश, जबलपुर, दिनांक 28-1-2010 को एतद्वारा प्रकाशित करता है।

(निर्णय अंग्रेजी में छपा है)

[सं. 82/म.प्र.-लो.स. (44/2009)/2010]

आदेश से,

बर्नार्ड जॉन, सचिव

ELECTION COMMISSION OF INDIA

NOTIFICATION

New Delhi, the 7th April, 2010

O.N. 13(E).—In pursuance of Section 106(b) of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby publishes the judgment of the High Court of Madhya Pradesh at Jabalpur dated 28-1-2010 in Election Petition No. 44 of 2009.

IN THE HIGH COURT OF MADHYA PRADESH AT
JABALPUR ELECTION PETITION No. 44/2009

Petitioner : Sukh Lal Kushwaha S/o Shiv Sevak Kushwaha, aged about 47 years, R/o Village-Bajvahi, Post Gora, Tehsil Amarpatan, Distt. Satna (M.P.)

Versus

Ganesh Singh S/o Not Known R/o Friends Colony, Birla Road, Ward No .12, Satna, Post-Birla Vikas, Satna Tehsil, Distt. Satna (M.P.)

Election Petition Under Section 80-A Read with Sections 81, 100(1)(a) and (d) of Representation of Peoples Act, 1951, Challenging the election of respondent No. 1 from Lok Sabha Constituency 09 Satna (Madhya Pradesh)

The Petitioner beg to submit as under :—

1. That, the petitioner is voter of 09 Satna Lok Sabha Constituency.

2. That, the petitioner contested the Lok Sabha Election from 9 Satna Constituency, on Bahujan Samaj Party Ticket, while the respondent contested on the BJP ticket. The Polling was held on 23-04-2009 and results were declared on 16-5-2009 (Sixteen May Two Thousand Nine) : The respondent was declared elected by margin of 4418 (Four thousand four hundred eighteen votes).

**THE HIGH COURT OF MADHYA PRADESH :
JABALPUR**

ELECTION PETITION No. 44 OF 2009

Petitioner : Sukh Lal Kushwaha, S/o Shiv Sevak Kushwaha, aged about 47 years, R/o Village Bajvahi, Post Gora, Tehsil Amarpatan, District Satna (M.P.).

Vs.

Respondent : Ganesh Singh S/o Kamal Bhan Singh R/o Friends Colony, Birla Road, Ward No. 12, Satna, Post Birla Vikas, Satna Tehsil, District Satna, M.P.

Counsel for the petitioner : Shri Dinesh Upadhyaya, Advocate.

Counsel for the respondent : Shri Pankaj Dubey, Advocate

ORDER

(28-1-2010)

Per Krishn Kumar Lahoti, J.

Order on I.A.76/09 under Order 7 Rule 11 and under Order 6 Rule 16 of the Civil Procedure Code, 1908.

1. The respondent has filed this application for dismissal of the election petition on following grounds :

- (a) That the election petition is liable to be dismissed for non-compliance of the provisions of Section 81(1)(a)(b) and (c) of the Representation of Peoples Act, 1951 (hereinafter referred as 'the Act').
- (b) That the petitioner has not made specific allegations in the manner prescribed under the Act. Each allegation of corrupt practice should have been mentioned with material facts and particulars thereof in accordance with the provisions of Sec. 81(1)(a) and (b) of the Act.
- (c) That the petitioner has not disclosed that on what date and the time the respondent committed corrupt practice. What are the acts alleged against the respondent amount to corrupt practice. Particulars have not been furnished by the petitioner.
- (d) That apart from an affidavit filed alongwith the election petition, a specific affidavit in support of the allegations of the corrupt practice ought to have been filed in Form No. 25 of the Conduct of Election Rules, 1961 (hereinafter referred to as the Rule). In absence of such an affidavit, the election petition is liable to be dismissed in so far as it relates to allegations of corrupt practice. The affidavit filed alongwith the election petition does not comply with the provisions as contained in Rule 94 A of the Rules.
- (e) That in absence of the sufficient material in the pleadings, the election petition does not disclose a cause of action for filing of the petition for its trial and on this ground alone

the election petition is liable to be dismissed. The petitioner has not furnished the name of parties alleged to have been committed corrupt practice, the date and place of commission of such corrupt practice.

- (f) That the petitioner has not disclosed, by which unfair means and corrupt practice the respondent contested the election. Though the petitioner has alleged that the officers and Presiding Officers were belonging to Kurmi Caste, helped the respondent for using unfair means but neither the name of such Returning Officers or Presiding Officers nor particulars of unfair means have been alleged.
- (g) That allegations in respect of bogus voting are without any particulars.
- (h) That in respect of Electronic Voting Machine (for short 'EVMs'), the allegations are made of tempering but no particulars are furnished. In absence of which, no cause of action arose to the petitioner for filing this election petition. That the allegations in the petition that there was difference in the votes at the time of tallying but no particulars in this regard has been furnished, even the names of Counting Agents and Polling Officers alleged to be threatened are not mentioned.
- (i) That no document has been filed or supplied to the respondent, though the petitioner has relied upon the documents in the election petition, in absence of which, no reply to the election petition can be filed.
- (j) That the petitioner has not signed and verified each page of the petition in the manner prescribed. The petitioner has also not signed the affidavit which has been filed in support of the election petition. The copy supplied to the respondent does not disclose that the petitioner was identified by any person. The copy supplied to the petitioner is not the correct copy of the affidavit filed alongwith the election petition.

On the aforesaid grounds it is stated by the respondent that the present election petition which has been filed without particulars and material facts may be dismissed or paragraphs 3, 4, 5, 6, 7, 8 and 10 of the election petition be directed to be deleted.

2. The petitioner herein in spite of seeking time initially on 4-9-2009 for two weeks, thereafter on 9-10-2009 by way of last opportunity, and on 13-11-2009 on payment of cost of Rs.1000 has not filed reply of this application. Ultimately on 4-12-2009 right to file reply of I.A.76/09 was closed.

3. The parties are heard on application I.A. 76/09.

4. Learned counsel for the respondent reiterated the contentions raised in the application. It was stated by him that in absence of material facts and particulars in the election petition, the election petition is liable to be dismissed. He has placed reliance to a recent judgment of the Apex Court in *Anil Vasudev Salgaonkar vs. Naresh Kushali Shigaonkar* [2009 (9) SCC 310]. He referred para 3 to 7 of the election petition to show that all the allegations are bald and vague, on the basis of which such election petition is liable to be dismissed. He has also relied on a judgment of Apex Court in *V. Narayanswamy vs. C.P. Thirunavukkarasu* [2000 (2) SCC 294]. He has also referred Rule 94-A of the Rules to show that an affidavit as required in Form No. 25 was not filed.

Lastly, it was submitted that each copy of the election petition is to be attested to be true copy under signatures of the petitioner but in this case the petitioner has not attested every page as true copy under his signatures which is the mandatory requirement under Section 81(b) of the Act and on this ground alone this election petition is liable to be dismissed. In support of this contention, the respondent placed reliance to a Single Bench judgment of Bombay High Court in *Narendra Bhikahi Darade vs. Kalyanrao Jaywantrao Patil* [AIR 2000 Bom 362].

5. Learned counsel for the petitioner opposed the aforesaid contention and submitted that the election petition has been filed on the grounds as enumerated under the Act. In so far as the proof of the grounds is concerned, in this regard evidence will be adduced. It is not necessary for the petitioner to plead evidence but the material facts have been pleaded in the election petition and on this ground the election petition cannot be dismissed.

6. To appreciate the aforesaid contentions, firstly the allegations in the election petition may be seen. The petitioner and respondent both contested the election of Member of Parliament from Constituency No. 9, Satna. The petitioner was a candidate of Bahujan Samaj Party while the respondent contested as a candidate of Bhartiya Janata Party. The polling was held on 23-4-2009 and the result was declared on 16-5-2009 in which the respondent was declared as an elected candidate with the margin of 4418 votes. The respondent achieved 1,90,624 valid votes. The petitioner herein made allegations in respect of corrupt practice in para 3 of the petition which reads as under :

“3. That, the respondent got elected with unfair means and corrupt practice since he belong to ruling party of the State. He influenced the local administration including the returning officer who are responsible to conduct the election and duty bound to hold the elections in free and fair manner.”

Other allegations which are pleaded in para 4 to 8 deserves to be reproduced to understand the allegations made by the petitioner against the respondent.

“ 4. That, the returning officer has selected and appointed the presiding officers in such a way that most of them belong to the Kurmi Caste i.e. the cast the respondent belongs, so that they can help and support the respondent in voting by adopting unfair methods. Many other presiding officers and other election officers were also supporter of ruling Bhartiya Janta Party. These presiding officers have made every effort to help the respondent by not only allowing the bogus voting in favour of the respondent but also turning away and denying voting rights to those voters who were suspected to be supporter of the petitioner. Specific instance of rigging of the election in Parasamania polling booth No.101 where voters were not allowed to cast their votes and were turned away. Their signatures have not been taken in the register and bogus votes have been cast in favour of the respondent and voters signature have been forget in register. Such illegal methods have been adopted in many other polling booths also. The petitioner polled 0-9 votes in as many as 55 polling booths as against only 8 polling booths where respondent polled 0-9 votes. Like wise in 66 (sixty six) polling booths the petitioner polled less than 20 (twenty) votes in comparison to 28 polling booth where the respondent polled less than 20 votes. This has happened because of the rigging and false voting in favour of respondent, facilitated by the presiding officers.

5. That, the electronic voting machines have been tempered with, in the office of the returning officer and also by presiding officers in polling booths. False votes have been allowed to be cast in favour of respondent while the genuine voters were not allowed to cast their votes. As per the rule the green paper seal is required to be affixed in the E.V.M. to seal it and before doing so signature of polling agents, have to be obtained. Presiding Officer is required to keep record of the green paper seal in proforma 17-C as provided in conduct of election rules. The record is required to be submitted alongwith EVMS in the office of returning officer. However in the instant case though the EVMS have been deposited by presiding officer but record of green paper seal have not been deposited till 11 p.m. leaving sufficient time to temper the EVMS.

6. That, even at the time of counting of votes rules have not been followed. As per the rules after completion of every round of counting the tally should be announced and then only next round of

counting should be started. But in the instant case after completion of third or fourth round the tally (vote count) or first round was announced and this process continued till the end. There were differences in the tally prepared on the table and announced by the returning officer on public address system. There was sufficient time gap between completion of counting round and announcement of tally leaving much time for manipulation in the counting. The petitioner has been leading in most of the counting rounds and he was ahead of respondent but all of a sudden in last two three round he started trailing behind and ultimately declared defeated by close margin of 4418 votes. The petitioner's counting agents raised objection but they have been threatened and intimidated by police and thereby cowed down.

7. That, though there was rigging not only in election process including polling and counting as the margin was very low petitioner moved an application for tabulation instead of recounting, the demand was accepted but no error was found in tabulation of the votes.

8. That, the respondent got himself elected by unfair and corrupt means by misusing the election machinery and therefore his election as Member of the Lok Sabha from 9 Satna constituency deserve to be quashed. The petitioner has cause of action to file this election petition before this Hon. Court."

7. The petitioner has filed an affidavit in support of the election petition. For ready reference entire affidavit, which contains only two paras, is reproduced as under :—

"1. That, I am filing the annexed election petition challenging the Election of respondent from 9 Satna Constituency.

2. That, contents of para 1 to 9 of the petition, they are in regard to facts are true to my personal knowledge and belief and also on the basis of the information supplied to me in this regard and regarding law, I believe them to be true on the advice given to me in this regard."

8. Now the legal position in respect of filing of an affidavit in a case where the election petition is filed on the basis of corrupt practice may be looked into. Rule 94-A of the Rules provided as under :

"94-A Form of affidavit to be filed with election petition—The affidavit referred to in the proviso to sub-section (1) of Section 83 shall be sworn before a magistrate of the first class or a notary or a commissioner of oaths and shall be in Form 25."

The aforesaid provision specifically provides that the affidavit provided in the proviso of sub-section (1) of

Section 83 shall be sworn in Form No. 25. Section 83(1) reads as under :

"83. Contents of petition—(1) An election petition—

- (a) shall contain a concise statement of the material facts on which the petitioner relies;
- (b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and
- (c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings :

[Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.]"

The aforesaid proviso specifically provide that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegations of such corrupt practice and the particulars thereof. Form No.25 of the Rules provides an affidavit in a prescribed form. For ready reference form No.25 is quoted as under :—

"Form 25

(see rule 94A)

I,, the petitioner in the accompanying election petition calling in question the election of Shri/Shrimati.....(respondent No.....in the said petition) make solemn affirmation/oath and say—

- (a) that the statements made in paragraphs.....of the accompanying election petition about the commission of the corrupt practice of.....and the particulars of such corrupt practice mentioned in paragraphs.....of the same petition and in paragraphs.....of the Schedule annexed thereto are true to my knowledge;
- (b) that the statements made in paragraphs.....of the said petition about the commission of the corrupt practice of.....and the particulars of such corrupt practice given in paragraphsof the said petition and in paragraphs of the Schedule annexed thereto are true to my information;
- (c)
- (d)

Signature of deponent.

Solemnly affirmed/sworn by Shri/
Shrimati.....at.....this.....day
of.....19.....

Before me, Magistrate of the first
class/Notary/Commissioner of Oaths.”

As stated hereinabove, the affidavit filed by the petitioner is not in the form prescribed in Rule 94-A. The petitioner herein, in spite of the filing of the objections under Order 7 Rule 11 CPC on 3-9-2009, has not made any prayer before this Court for filing an affidavit as provided under Rule 94-A.

9. Now the legal position in this regard may be looked into. In *V. Narayanswami (supra)* the Apex Court considering this legal issue held that the affidavit must affirm not only to the form prescribed in substance but also contain particulars as prescribed by the Rules, otherwise the petition would be liable to be rejected at the threshold. The Apex Court further held in para 23 and 26 of the judgment that a petition levelling a charge of corrupt practice is required by law to be supported by an affidavit and the election petitioner is obliged to disclose his source of information in respect of the commission of corrupt practice. He must state which of the allegations are true to his knowledge and which to his belief on information received and believed by him to be true. It is not the form of the affidavit but its substance that matters. To plead corrupt practice as contemplated by law it has to be specifically alleged that the corrupt practices were committed with the consent of the candidate and that a particular electoral right of a person was affected. It cannot be left to time, chance or conjecture for the Court to draw inference by adopting an involved process of reasoning. Where the alleged corrupt practice is open to two equal possible inferences the pleadings of corrupt practice must fail. Where several paragraphs of the election petition alleging corrupt practices remain unaffirmed under the verification clause as well as the affidavit, the unsworn allegations could have no legal existence and the Court could not take cognizance thereof. Charge of corrupt practice being quasicriminal in nature, the Court must always insist on strict compliance with the provisions of law. In a petition on the allegation of corrupt practices, cause of action cannot be equated with the cause of action as is normally understood because of the consequences that follow in a petition based on the allegations of corrupt practices. An election petition seeking a challenge to the election of a candidate on the allegation of corrupt practices is a serious matter, if proved not only that the candidate suffers ignominy, he also suffers disqualification from contesting the election for a period that may extend to six years. Filing of the affidavit as required is not a mere formality. By naming a document as an affidavit it does not become an affidavit. To be an affidavit it has to conform not only to the form prescribed in substance but has also to contain particulars as required by the Rules.

10. In this case from the perusal of the pleadings and the affidavit filed by the petitioner, there is no iota of doubt that the petitioner failed to plead material facts alleging corrupt practice and to file affidavit in this regard. In absence of which, the petition on the aforesaid ground of corrupt practice is liable to be dismissed.

11. Para 3 of the election petition does not disclose any allegations of the corrupt practice or unfair means allegedly used by the respondent herein. In para 4 of the petition, the petitioner has made certain vague allegations against returning officer about appointing presiding officer belonging to the Kurmi caste, the caste to which the respondent belong but has not furnished any particulars in respect of appointment of such presiding officers of Kurmi caste at some polling booths. No particulars about booth number or name of such officers are furnished. Apart from this, the petitioner ought to have alleged in what manner these presiding officers helped and supported the respondent in voting by adopting unfair methods. Though the allegations are in respect of bogus voting in favour of the respondent but by which presiding officer, at which booth the bogus voting took place, has not been pleaded, in absence of which, the allegations in para 4 of the election petition are apparently vague in nature.

12. In respect of rigging of election in Parasamania polling booth No. 101, though alleged but without any particulars. In absence of particulars, no inference or findings can be recorded in favour of the petitioner. In later part of para 4, the petitioner alleged that at 55 polling booths the petitioner polled 0-9 votes, only at 8 polling booths respondent polled 0 to 9 votes and at 66 polling booths the petitioner polled less than 20 votes in comparison to 28 polling booths where the respondent polled less than 20 votes. But without making specific allegation in this regard no cause of action arose to the petitioner for filing such an election petition.

In absence of such particulars, whether an election petition can be entertained, the legal position has been considered by the Apex Court recently in *Anil Vasudev [supra]* wherein the Apex Court held that an election petition can be summarily dismissed, if it does not furnish the cause of action in exercise of power under the Code of Civil Procedure. Appropriate orders in exercise of powers under the Code can be passed if the mandatory requirements provided by Section 83 of the Act to incorporate the material facts in the election petition are not complied with.

13. Now the allegations in respect of EVMs as stated by the petitioner in para 5 of the election petition may be looked into. The petitioner has stated that though the EVMs were deposited by the presiding officers' but records of green paper seal were not deposited till 11 p.m. leaving sufficient time to temper the EVMs. But no particulars have been furnished by the petitioner in respect of EVMs of a particular booth. Apart from this, there are no pleading that in fact any such objection was raised by the petitioner

hereinbefore the Election officer in respect of tempering of the EVMs.

14. In para 6 of the election petition the petitioner has alleged that at the time of counting of votes, rules were not followed. It is alleged that after completion of every round of counting, tallying could have been announced and then only next round of counting could have been started. In the election in question, after completion of third or fourth round, the tally of first round were announced and this process continued till the end of counting. It is alleged that there were difference in tally prepared on the table and announced by the Returning officer on Public Address System. But what was in fact announce and what was the difference has not been pleaded in para 6 of the petition. The petitioner simply stated that he was leading in most of the counting rounds and he was ahead of the respondent and all of a sudden in the last two, three rounds he was trailing, by itself is not a ground to draw any inference that there was any irregularity or illegality in counting of the votes. It will be pertinent to mention that in fact no particulars have been furnished by the petitioner in para 6 of the election petition pleading a cause of action or making out a case of interference in the election or affecting the result of election substantially on the basis of alleged non announcement of tally immediately after the completion of round of counting.

15. In para 7 the petitioner has stated that his application for tabulation was accepted but no error was found in tabulation of the votes. In para 8 of the election petition, petitioner has stated that the respondent got himself elected by unfair and corrupt means by misusing the election machinery, therefore, his application deserves to be quashed. As stated hereinabove the petitioner has

not furnished particulars and material facts to make out a case under section 83 of the Act in absence of which, this Court left with no option except to dismiss the election petition because of non furnishing of material facts, particulars in the election petition alleging corrupt practice and irregularities. Apart from this, an affidavit as required under Rule 94-A has also not been filed by the petitioner.

In so far as the contention of the petitioner that the copy of the election petition was not attested as true copy is concerned, from the perusal of the copy of the election petition served on the respondent, it is apparent that on every page, the petitioner has stated true copy and below it he has signed. The aforesaid is the sufficient compliance of the rules. See Ram Prasad Sarma vs. Mani Kumar Subba [2003 (1) SCC 289]. In view of the settled position of the law by Ram Prasad (supra) on this ground, the election petition cannot be dismissed at the threshold. So this contention of the respondent is found without merit.

16. As the contention of the respondent in respect of non pleading material facts and particulars in the petition, non-filing of the affidavit as required under Rule 94-A of the Rules are found merit, so this Court has no option except to dismiss the election petition summarily.

In view of the aforesaid, application filed by the respondent is allowed. The election petition filed by the petitioner is dismissed but with no order as to costs.

Sd/-

KRISHN KUMAR LAHOTI, Judge

[No. 82/MP-HP/(44/2009)/2010]

By Order,

BERNARD JOHN, Secy.